No. 20526.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SCHNITZER STEEL PRODUCTS CO., a corporation,
Appellant,

vs.

CIA. ESTRELLA BLANCA, LTD., as owner of the S.S. NICTRIC, and AMTRO CORPORATION, S.A.,
Appellees.

AMTRO CORPORATION, S.A.,
Cross-Appellant,

vs.

SCHNITZER STEEL PRODUCTS CO., a corporation, and CIA. ESTRELLA BLANCA, LTD.,
Cross-Appellees.

Opening Brief for Cross-Appellant Amtro Corporation, S.A. on Cross-Appeal.

ALEX L. PARKS,
DUSENBERY, MARTIN, BEATTY, PARKS & TEMPLETON,
1107 Standard Plaza,
Portland, Oregon 97204,

ROBERT A. FLETCHER,
FLETCHER & RAUCH,
4050 Wilshire Boulevard,
Suite 408,
Los Angeles, Calif. 90005,

Proctors for Cross-Appellant, Amtro Corporation, S.A.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Opening Brief for Cross-Appellant Amtro Corporation, S.A. on Cross-Appeal.

Jurisdictional Statement.

This Cross-Appeal is from a final decree in admiralty of the United States District Court for the District of Oregon, Honorable John F. Kilkenny, Judge Presiding [R. Vol. I, pp. 152-154; 130-149]. That decree is in an action by Cia. Estrella Blanca, owner of the vessel S.S. NICTRIC (hereinafter referred to as "Owners" in this brief) against the time-charterer of the vessel, Amtro Corporation, S.A. (hereinafter referred to as "Amtro" in this brief) commenced by libel and foreign attachment garnishing all amounts owing by

Schnitzer Steel Products Co. (hereinafter referred to as "Schnitzer" in this brief) to Amtro under a voyage charter of the vessel by Amtro to Schnitzer, in which Amtro appeared, filed claim, and asserted its claims against Schnitzer by cross-libel. The decree awards certain sums to Owners against Amtro, and certain sums to Amtro against Schnitzer, and directs that so much of the latter as necessary be applied to satisfy Owners' decree. This cross-appeal is directed to the failure of the decree in favor of Amtro against Schnitzer to award to Amtro certain additional sums sought by it, and to one item of the amounts awarded to Owners against Amtro.

The District Court had jurisdiction, by virtue of the constitutional grant of admiralty and maritime jurisdiction (Art. III, Sec. 2) and by virtue of 28 U.S.C.A. §1333(1), of all of the claims asserted in the libel and cross-libel as claims arising under and in connection with ship charters, which are maritime contracts, and as claims necessary to be resolved for a complete determination of the rights of the parties in a case where the first and fundamental exercise of the jurisdiction of the court is maritime. The District Court also had jurisdiction of all claims by Amtro against Schnitzer based on diversity of citizenship, 28 U.S.C.A. §1332(2), since Amtro is a corporation organized and existing under the laws of Panama, and Schnitzer is a corporation with its principal place of business in Portland, Oregon (Articles I and II of the Cross-Libel [R. Vol. I, p. 16] admitted in Articles I and II of Schnitzer's Answer [R. Vol. I, p. 27]).

The jurisdiction of this Court to review the said decree upon Amtro's Cross-Appeal rests upon the notice of appeal duly served and filed by Amtro on August 6, 1965 [R. Vol. I, p. 193] and upon 28 U.S.C.A. §§1291, 1294(1). No direct review by the Supreme Court may be had in this case.

Statement of the Case.

This case is a three-cornered controversy between the Owners of the cargo vessel S.S. Nictric, Amtro, as her time charterer, and Schnitzer as her voyage charterer. Amtro, by a time charter with owners, [Lib. Ex. 1, admitted R. Vol. II, p. 5] rented the cargo carrying capacity of the Nictric for a fixed period of time at a fixed monthly hire, the vessel continuing to be operated and maintained by the Owner with the Owner's master and crew, but at Amtro's directions as to employment. By voyage charter, [Lib. Ex. 2, admitted R. Vol. II, p. 5] Amtro sublet the carrying capacity of the vessel to Schnitzer, a large scrap metal dealer and exporter, for a single voyage carrying scrap steel from the Pacific Northwest to Japan, at a lump sum freight payable 90% in advance and 10% upon completion of discharge.

In the voyage charter, Schnitzer agreed to load, stow and discharge the cargo free of expense to Amtro, and to do so within a total of twenty-three (23) weather working days (usually called the "lay time") including time waiting for a berth. Schnitzer further agreed in the charter that if the vessel were "longer detained"

(without any time limit on this) Schnitzer would pay Amtro "demurrage" at the rate of $700.00 per day.[1] This rate was less than the amount necessary to cover Amtro's expenses for the vessel during such detention. The charter also provided that "any extra expenses incurred by reason of nature of cargo" were to be for Schnitzer's account.[2]

The discharge in Japan was delayed for a period of nearly three months beyond the lay time due to congestion applicable to scrap cargos and the shortage of scrap discharge facilities at the port of Tokyo, Japan, to which Schnitzer sent the cargo.

During this long delay, the monthly hire of the vessel payable by Amtro to Owners kept accruing. Amtro demanded that Schnitzer pay the demurrage on a current basis. Schnitzer did not pay. After the vessel had been on demurrage for about one month, in response to a further demand by Amtro for payment of the demurrage, Schnitzer agreed to pay the demurrage, but objected to payment of the demurrage and the balance of the freight until completion of the discharge of the vessel on the ground that such items were not due under the charter until that time. Amtro threat-

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[1]The applicable provisions of the voyage charter [Lib. Ex. 2] (Schnitzer being "Charterer") were:

"17. Cargo is to be loaded, stowed and discharged by the Charterers, free of expense to the vessel.

"18. Cargo is to be loaded, stowed and discharged within a total of twenty-three (23) weather working days of 24 hours. . . . If longer detained, Charterers to pay demurrage at the rate stipulated in Clause 7 . . ."

"7. Demurrage, if incurred, to be paid by Charterers at the rate of seven hundred dollars ($700) per day or pro rata for any part of a day."

"20. At each port, time to count . . . after due notice given, whether vessel in berth or not."

[2]Voyage charter [Lib. Ex. 2] clause 1.

ened to lien the cargo for the demurrage. Schnitzer took the position that under the charter Amtro had no lien on the cargo for the demurrage. Schnitzer persisted in this position toward Amtro until after the cargo had been discharged on December 31, 1961, and Amtro had lost whatever possessory lien on the cargo it might otherwise have had. At that point, Amtro demanded payment of the demurrage and freight from Schnitzer in accordance with the position Schnitzer had taken as to the date when it was payable. By this time, due to Schnitzer's failure to pay the demurrage, and the fact that Amtro could earn nothing from the operation of the vessel while it was waiting to discharge Schnitzer's cargo, Amtro had run out of funds and had fallen into default to Owners for time charter hire. Owners agreed however to waive the default if Amtro paid the arrearage promptly. When Amtro demanded payment from Schnitzer at the completion of discharge, Amtro advised Schnitzer that it needed payment of the demurrage in order to cure the default under its time charter with Owners, and that if the demurrage and freight were not paid, Amtro would be forced into final breach of its charter with Owners and would suffer damage as a result. Schnitzer refused to pay, and asserted thereafter, for the very first time, that it didn't owe the demurrage or freight at all because Amtro had failed to exercise a lien on the cargo. Schnitzer made this 180° reversal of position and refused to pay with full knowledge that this would ruin Amtro, and it did ruin Amtro. Since Schnitzer's action had made Amtro unable to reinstate the time charter, the Owners withdrew the vessel under the terms of the time charter effective December 31, 1965, and re-chartered her to another party, holding Amtro liable for damages.

Owners filed this action against Amtro for amounts due under the time charter and damages for its breach, and, by Writ of Foreign Attachment, attached all sums due from Schnitzer to Amtro. Amtro asserted its claims by cross-libel against Schnitzer. After trial, the District Court gave a decree in favor of Owners against Amtro for the amounts which it concluded were due from Amtro to Owners under the time charter, and for damages for breach of the time charter, consisting of the difference between the charter hire payable by Amtro for the balance of the term of the time charter remaining after Owners' withdrawal of the vessel less the amounts realized by Owners on a re-charter of the vessel to another party during a portion of that period. Amtro is appealing from that decree only in respect of one item of the amounts held to be due under the time charter.

The District Court gave Amtro a decree against Schnitzer for the demurrage and the unpaid balance of the freight under the voyage charter, with interest. We believe that the District Court was, beyond any doubt, correct in both its interpretation of the voyage charter and its findings of fact supporting this part of its decree. Amtro also claimed damages against Schnitzer for fraud in the inducement of the voyage charter. The District Court found the facts adversely to Amtro here, and although we believe that the Court weighed the evidence incorrectly, we must concede that the evidence on the material points was conflicting and that Amtro has no proper appeal to this Court on that issue. Amtro's Cross-Appeal with respect to the decree in its favor against Schnitzer is based on the failure of the District Court to include in that decree, in addition to the freight and demurrage, judgment for the sum of $33,975.00

under the "extra expense" clause of the voyage charter, and judgment for the sum of $24,745.27, plus interest, for which Amtro became liable to Owners for breach of the time charter because of Schnitzer's refusal to pay the demurrage on completion of the discharge.

Because of the complexity of this case, this statement has been a fairly general one. A further statement of the particular facts applicable to the points urged on this Cross-Appeal will be made in the argument. No attempt is made in this brief to state the additional facts which are material on the issues raised by Schnitzer's appeal.

Specifications of Error.

1. The District Court committed error of law in failing to include the amount of Amtro's liability to Owners for breach of the time charter (24,745.27 plus interest) in its decree in favor of Amtro against Schnitzer as damages for:

   a. Schnitzer's breach of the voyage charter contract, and

   b. Schnitzer's tort of intentional and unprivileged prevention of Amtro's performance of the time charter.

2. The District Court erred in failing to award to Amtro against Schnitzer the sum of $33,975.00 under clause 1 of the voyage charter providing, "Any extra expenses incurred by reason of the nature of cargo . . . to be for charterer's account." The errors committed in this connection were:

   a. Error in construing the provision not to include extra expenses due to delay by reason of the nature of cargo [R. Vol. I, pp. 145-146].

b. Error in its finding of fact that "the record . . . does not support a finding that the total delay, or any specific part thereof, was due to the nature of cargo" [R. Vol. I, p. 145].

3. The District Court erred in construing the provision of clause 23 of the time charter, requiring Amtro to pay Owners "$350.00 per month or pro rata in lieu of all over time," to apply during the entire period of the time charter [R. Vol. I, pp. 133-134], rather than only during the loading and discharge of the vessel to which clause 23 related. This error rendered Owners' judgment against Amtro for amounts due under the time charter excessive to the extent of $1,179.94.

Summary of Argument.

I.

The $24,745.27, plus interest, for which Amtro was held liable to Owners for breach of the time charter should have been awarded to Amtro against Schnitzer as damages both for Schnitzer's breach of the voyage charter and for Schnitzer's tort of intentional and unprivileged prevention of Amtro's performance of its contract with Owners.

A. The actual cause of Amtro's breach of its time charter was Schnitzer's failure to discharge the vessel within the time provided in the voyage charter or to pay the demurrage. If Schnitzer had performed or paid, the breach of the time charter would not have taken place. The fundamental principle of the law of contract damages, namely to give compensation, to put the injured party in as good a position as if the contract had been performed, therefore requires the award of these damages.

The *Hadley v. Baxendale* rule generally limiting recovery of contract damages to those reasonably within the contemplation of the parties at the time when the contract was entered into does not forbid the damages in question. From the facts shown by unconflicting evidence to have been known to Schnitzer when the voyage charter was entered into, Schnitzer knew that a sufficiently serious breach of the voyage charter would cause damage of this type. Under the rationale of the rule, it should make no difference that, as the District Court found, the parties did not contemplate when the charter was entered into that the breach would be as great as it turned out to be.

In any event, the *Hadley v. Baxendale* rule should not be applied, in derogation of the overriding principle of compensation, where the reasons behind the rule do not support its application. The reason for the rule is that since a party who contracts usually assumes some risk that unforeseen circumstances may prevent or hinder his performance. it would unduly discourage the making of contracts if that party were held to a liability for failure to perform greater than that which he can foresee at the time he undertakes the obligation as likely to follow from non-performance. By paying the demurrage upon receiving notice from Amtro that non-payment would cause these damages to Amtro, Schnitzer could have limited its liability to no more than that which it expressly assumed in the event of its non-performance of its obligation that the vessel be discharged in time, namely the demurrage for the period of delay, however long. When the defaulting party to a contract has had, but has failed to take, this opportunity, there is no longer any reason for refusing to allow the injured party its full actual damages.

B. Schnitzer's refusal to pay the demurrage with knowledge that its failure to do so would disable Amtro from performing its time charter with owners was tort against Amtro as well as a breach of contract. The tort, recognized in admiralty as well as generally in the United States, was intentional interference with an existing contract relation (the time charter). The tort may be committed by acts which prevent one of the parties to a contract from performing it, financially or otherwise. It is actionable by the party prevented, and the damages include that party's liability to the other.

Under the admiralty decisions, as well as in the view advocated by the text writers, the tort is committed by an act which the actor knows will cause the breach, even though it is done for another purpose, unless that purpose and the means used are privileged. Schnitzer's refusal to pay was in that class, since its purpose, as far as appears from the record, was to postpone or avoid, if possible, the payment of the demurrage. The question of privilege is the question whether that purpose and the means used to advance it should be given protection by the law superior to the protection to which a party in Amtro's position is entitled. The purpose to avoid payment of a clear contractual obligation should create no privilege. If there is a privilege for the assertion of a bona fide (though mistaken) defense, Schnitzer cannot invoke it, since the only defense to payment urged by Schnitzer in the District Court (and presumably here) is based on an interpretation of the

voyage charter directly contrary to the charter interpretation urged by Schnitzer upon Amtro while the charter was in effect and at the time when Schnitzer refused to pay, and so prevented Amtro's performance of the time charter.

The District Court accordingly erred in denying these damages to Amtro, and its decree must be reversed in this respect, with direction to enter decree in favor of Amtro for these damages in addition to the demurrage and the balance of the freight.

II and III.

The issues on the extra expense clause of the voyage charter (Specification of Error 2) and the crew overtime clause of the time charter (Specification of Error 3) are, though important, so narrow in scope that a separate summary of our argument on these would, we believe, be more repetitive than helpful.

ARGUMENT.

I.

The District Court Erred in Failing to Award to Amtro Judgment Against Schnitzer in the Amount of Amtro's Liability to Owners for Breach of the Time Charter.

The District Court properly gave to Owners judgment against Amtro in the sum of $24,745.27, plus interest, as damages for Amtro's breach of the time charter. The breach consisted in Amtro's failure to keep up the payments of time charter hire, as a result of which Owners withdrew the vessel under the time charter, effective on the completion of the discharge of the Schnitzer cargo. The damages awarded against Amtro consisted of the difference between the charter hire for the balance of the period of the time charter with Amtro and the amounts earned by Owners on a charter of the vessel to another party.

The undisputed evidence shows that the actual cause of Amtro's breach of the time charter and the damages suffered by Amtro therefrom in the form of judgment against Amtro by Owners was the failure of Schnitzer to discharge the vessel within the lay time provided in the voyage charter, coupled with the refusal of Schnitzer to pay the demurrage and the balance of the freight provided in the voyage charter. Until Schnitzer's cargo was discharged from the vessel, Amtro could, of course, not employ the vessel to earn any additional revenue. During the delay in discharge in Japan, Amtro's obligation to pay charter hire to Owners went right on. The operation of the Nictric under charter was at the time Amtro's sole business [R. Vol. II, p. 51]. Amtro's capital and the prepaid freight received on the Schnitzer charter

was sufficient to meet Amtro's charter hire payments and other expenses through November 7, 1961 [Pretrial Order, Admitted Facts IV, R. Vol. I, p. 103]. This was a month beyond the date when discharge would have been completed, and the vessel would have been available to Amtro for further employment, had Schnitzer discharged the vessel within the time promised in the voyage charter (The lay days expired October 9, 1961 [Pretrial Order, Admitted Facts X, R. Vol. I, p. 105]). Because of the unavailability of the vessel and Schnitzer's failure to pay the demurrage during the month of October, Amtro ran out of funds and was unable to pay the charter hire payment due November 7, 1961 [R. Vol. II, pp. 51-52]. The advance deposit of charter hire which Amtro had up with Owners was then applied to pay the charter hire through December 7, 1961 [Pretrial Order Admitted Facts IV, R. Vol. I, p. 103]. Amtro was without funds to pay charter hire beyond that point without payment of demurrage by Schnitzer. Since the non-payment was a breach of the time charter, Owners announced withdrawal of the vessel from Amtro, effective on completion of discharge, and stated their intention to hold Amtro liable for damages for the breach. Owners, however, announced themselves prepared to waive the default and reinstate the time charter if Amtro paid the amounts due under the time charter promptly following completion of discharge of the vessel.[3]

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[3]Discharge was completed at midnight December 30-31, 1961, Japan time (December 29-30, 1961, U. S. West Coast time, due to the International Date Line). [Pretrial Order, Admitted Facts VIII, R. Vol. I, p. 105]. On December 31, 1961, Amtro received the following cable from Owners' New York brokers [Amtro Ex. 59 admitted R. Vol. II, p. 117]:

"In reply to your telegram 29th London cabled 30th quote Nictric owners quite prepared reinstate time charter pro-

The amount due under the time charter at that time, as found by the District Court, was $23,689.30. The escrow deposit was a month's charter hire or $24,629.50. The amount required to reinstate the time charter was therefore $48,318.80. The amount of the demurrage and freight due and payable by Schnitzer on the completion of discharge was $62,307.10, considerably more than enough to reinstate the time charter, including the deposit of one month's hire in advance. Therefore, if Schnitzer had paid the demurrage and balance of freight promptly after the completion of discharge, Amtro's breach of the time charter would have been avoided, and Amtro would not have become liable to Owners for the $24,745.27 plus interest, in damages for that breach.

The undisputed evidence further shows that as the time for completion of discharge approached, and again when the discharge was completed, Amtro put Schnitzer on notice that if Schnitzer paid the demurrage and the balance of the freight a breach of Amtro's time charter would be avoided, and that if Schnitzer did not pay, the breach of the time charter with the resultant damage to Amtro would be inevitable.[4] Schnitzer refused to pay in the face of that notice, and Amtro suffered the damages made inevitable thereby.

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vided all outstanding moneys paid and further months hire deposited escrow stop. ETD tomorrow thence repairing ETC 8/10 January therefore subject unfixed other business Amtro have few days arrange finance unquote."

[4]The uncontradicted evidence shows that on December 26, 1961, Amtro's counsel sent the following telegram to Schnitzer [Amtro Ex. 60 admitted R. Vol. II, p. 116]:

"Re Nictric in our previous discussions you asserted that demurrage was payable upon completion of discharge and not before then stop. If you pay balance of freight and all demurrage owing on completion of discharge as you have contended it is payable Amtro will be able to cure its breach of its charter with owners stop. You are hereby given notice

Amtro's cross-libel against Schnitzer sought to recover these damages in addition to the demurrage and the balance of the freight. The District Court denied this recovery to Amtro. We contend that the District Court erred in so doing. Under the findings of the District Court and the uncontradicted evidence, the District Court should have awarded Amtro these damages for Schnitzer's breach of the voyage charter contract and for Schnitzer's tort of intentional and unprivileged prevention of Amtro's performance of the time charter.

A. The District Court Should Have Awarded Amtro These Amounts as Damages for Schnitzer's Breach of the Voyage Charter Contract.

The overriding principle and basic purpose of the law of contract damages is, as stated in

> *Williston, Contracts,* Rev. Ed. 1936, vol. 5, p. 3763
>
> ". . . to give compensation, that is to put plaintiff in as good a position as he would have been had defendant kept his contract."

This basic and overriding principle requires the award of these damages to Amtro for breach of contract, since if Schnitzer had either discharged the vessel within the

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that if you do not pay all demurrage and unpaid freight promptly upon completion of discharge Amtro's charter will be incurably lost and Amtro will hold you liable for all loss and damage suffered by it thereby."

On January 2, 1962, Amtro's counsel sent the following further telegram to Schnitzer [Amtro Ex. 62 admitted R. Vol. II, p. 116]:

"Nictric completed discharge Dec. 31 all demurrage freight now due payable stop. Owners have agreed reinstate charter if Amtro pays all sums due by Jan. 8 stop. Amtro can do so only if you pay demurrage freight by that date stop. If you do not pay Amtro holds you liable all damages arising from loss charter."

time in which it had contracted to discharge it or paid the demurrage, these damages would not have been suffered by Amtro.

The District Court denied these damages on the basis of a conclusion that they were not within the contemplation of the parties at the time the voyage charter was entered into. In so doing, the District Court obviously sought to apply what is commonly referred to as the rule in

> *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145.

This rule, if carefully and properly analyzed in the context of the particular characteristics of the voyage charter as a contract, does not forbid Amtro's recovery. The District Court opinion, in the nature of Findings of Fact on this issue, states [R. Vol. I, p. 142]:

> "After a complete analysis of the evidence before me, I do not believe that it would support a finding that either Amtro or Schnitzer contemplated the long delay which was incurred at the ports of discharge, nor could Schnitzer contemplate that its failure to pay demurrage would result in a withdrawal of the charter and consequential damages as herein fixed."

Since there is evidence to support it, although the evidence is conflicting, we must accept the District Court's finding that neither Amtro nor Schnitzer contemplated, at the time the voyage charter was entered into, the long delay which was incurred at the ports of discharge. We must take the second clause of the quoted finding to be dependent upon and a conclusion from the first, since, if it is not, it is clearly erroneous under the uncontradicted evidence.

The uncontradicted evidence demonstrates that Schnitzer knew when it entered into the voyage charter that Amtro was the time charterer of the vessel. The voyage charter with Schnitzer describes Amtro as "time chartered owner."[5] A time charter, as its name implies, is always a charter at a fixed rate of hire based on time, and the hire continues no matter what the vessel is doing. Since Schnitzer's voyage charter was for the whole capacity of the vessel, it necessarily followed, and was known to Schnitzer, that until the cargo carried under the voyage charter was discharged, Amtro could earn no other income from the vessel with which to keep up the payments of the time charter hire. Schnitzer must have known from these facts that if Schnitzer failed *in a substantial enough degree* to fulfill its obligation in the voyage charter to discharge the vessel within the lay time provided in the voyage charter, and if Schnitzer then failed to pay the demurrage, it would follow in the ordinary course of things that Amtro would be forced into breach of its time charter and would become liable to owners in damages.

Concededly, this result was likely only if there were a long delay and a large demurrage obligation. The voyage charter, however, obligated Schnitzer to discharge the vessel within the twenty-three (23) weather working days, and provided that Schnitzer was to pay demurrage at the rate of $700.00 per day "if longer detained."[6] The voyage charter states no limit, and implies no limit, to the length of the detention for which Schnitzer is obligated to pay demurrage. In agreeing in a charter of this kind to discharge the vessel within a

[5]Voyage charter [Lib. Ex. 2] clause 1, line 1.

[6]Voyage charter provisions quoted in footnote 1 page 4.

fixed time, Schnitzer assumed the risk of *all* unforeseen circumstances which might prevent or delay discharge.

Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 77 Fed. 919 (8th Cir. 1896);

St Ioannis Shipping Corporation v. Zidell Explorations, Inc., 222 F. Supp. 299 (D. Ore. 1963) aff'd 336 F. 2d 194 (9th Cir. 1964).

Therefore, Schnitzer assumed in this charter the risk of any delay, *however long,* and even if the discharge were delayed substantially forever, it would not relieve Schnitzer of the obligation it assumed. If Amtro's breach of its time charter should reasonably have been contemplated by Schnitzer as a result of a delay of any length, no matter how long, these damages were within Schnitzer's contemplation as likely to follow from a breach of the obligations it assumed in the voyage charter. A long enough delay could be expected to break any time charterer. These damages were therefore within Schnitzer's contemplation when it entered into the voyage charter.

To limit recoverable damages to those which could be contemplated as likely to flow from the *degree of breach* which the parties considered likely when the contract was entered into would make nonsense of the rule. When parties enter into a contract they ordinarily do not contemplate that it will be breached at all. Surely, under the rule in *Hadley v. Baxendale,* all damages are recoverable which are within the contemplation of the parties as a likely result of even a very large breach of the contract.

In any event, the rule in *Hadley v. Baxendale* should not be applied in view of the particular circumstances of this case. That rule is not, after all, a legislative en-

actment. It is a limitation worked out by the courts, in derogation of the general principle of awarding compensatory damages in contract cases, for particular reasons of policy. *It should not be applied when these reasons are not applicable.* The reasoning supporting the rule is that since a party who contracts usually assumes some risk that unforeseen circumstances may prevent or hinder his performance, it would unduly discourage the making of contracts if that party were held to a liability for failure to perform greater than that which he can foresee at the time he undertakes the obligation as likely to follow from some degree of nonperformance. A typical statement of these considerations is found in one of the cases cited by the District Court,

> *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543, 28 S. Ct. 754, 47 L. Ed. 1171 (1902).

Ordinarily these considerations are unchanged by the fact that notice of the damages which will flow from a breach is given to the party after the contract is made but before the time for performance arrives, since at that time the party to whom notice has been given may still be unable to deliver the promised performance, and to hold him for damages on the basis of notice at that time will still increase his risks beyond those which he knew or ought to have known he was assuming when he entered into the contract. This is the reason why, as Justice Holmes observed in the *Globe Refining Co.* case:

> "The suggestion thrown out by Bramwell, B., in Gee v. Lancashire & Yorkshire Ry. Co., 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions."

These policy considerations in no way support a denial of the damages sought by Amtro under the particular facts in this case. The risk expressly assumed by Schnitzer in the voyage charter was the risk that unforeseen circumstances would prevent discharge of the vessel within the time provided, and that Schnitzer would have to pay demurrage for that time, no matter how long it might be. When Amtro gave Schnitzer notice of the consequences that would follow from non-payment of the demurrage, Schnitzer had the opportunity to avoid these consequential damages by paying the demurrage. By paying at that time, Schnitzer could have held its liability for the delay in discharge to exactly the liability which it expressly assumed in the charter, namely the demurrage, however much it might be. Schnitzer chose not to avail itself of that opportunity. There is no evidence in the record to show or suggest that Schnitzer was unable to pay the money, had it choosen to do so, and Schnitzer has never contended in this case that it was unable to pay due to unforeseen circumstances or otherwise. Since Schnitzer was given the opportunity to limit its liability to that assumed by the express terms of the charter, and did not choose to avail itself of it, the reason for the rule in *Hadley v. Baxendale* is not violated by allowing to Amtro the damages actually caused to Amtro and actually known to Schnitzer when it rejected this opportunity. The rule should therefore not be applied to prevent the award of fully compensatory damages in this case.

Looked at from a slightly different vantage point, what Schnitzer did by rejecting this opportunity was to refuse, when it could reasonably have done so, to mitigate the damages flowing to Amtro from Schnitzer's

breach of its charter obligation of timely discharge of the vessel. If the party injured by a contract breach has a duty to act reasonably to mitigate its damages, the party breaching the contract must have at least an equal duty. As stated in,

> 14 California Jurisprudence 2d, pp. 731-2.
> "In the event of a breach of contract, the parties are *mutually* obligated to mitigate the damages stemming from the breach; . . . (emphasis added)"

We have been unable to find any authority applicable to the situation presented in this case which would be binding upon this court. The closest analogy we have found to the problem of contract damages presented in this case is that considered by the Supreme Court of Texas in

> *Bourland v. Choctaw, O. & G. Ry. Co.*, 99 Tex. 407, 90 S.W. 483 (Supreme Court of Texas 1906).

In that case plaintiff was fattening beef cattle for market. Anticipating that his supply of feed would soon be exhausted, he purchased two carloads of feed and delivered them to defendant Railway to be carried to his feed lot. No notice was given to defendant at that time of the purpose for which the cake was needed, nor of the damage which would result from delay in delivering it. On the day on which the railroad cars reached their destination, plaintiff applied to defendant's station agent for delivery of the shipment, and stated to defendant's agent at that time that plaintiff was out of feed and that plaintiff had to have the feed to feed his cattle. After receiving this notice, defendant failed to make delivery, and by some mistake the cars were

sent out on another railroad and were not recovered. The feed was not delivered until nearly a month later. The jury awarded the plaintiff damages based on the depreciation in value of plaintiff's cattle caused by the lack of feed. The intermediate appellate court reversed on the basis of the Texas decisions applying *Hadley v. Baxendale*. The Supreme Court of Texas reversed the intermediate court and affirmed the judgment of the trial court awarding the damages. It reasoned as follows:

> "The Court of Civil Appeals felt constrained by the decisions of this court in the case of Missouri, Kansas & Texas Railway Company v. Belcher, 88 Tex. 549, 32 S.W. 518, Id., 89 Tex. 428, 35 S.W.6, Id., 92 Tex. 593, 50 S.W. 559 to hold that damages of the character claimed were not recoverable, because notice of the peculiar state of facts under which they might arise as a consequence of delay in the transportation and delivery was not given to the defendant before or at the time of the making of the contract of carriage. It is true that the statement, in Hadley v. Baxendale, and in the many cases following it, of the rule for the recovery of damages of a special or exceptional kind for the breach of a contract for the delivery of property, includes, as essential to liability therefor, notice, at the time of the making of the contract, to the party bound to deliver, of the peculiar conditions under which such damages are likely to result from the breach; and the formula seems sometimes to have been applied as rigidly as if it were a rule prescribed by legislative act. Its operation has generally been wise and just, and it is only

when it is made the exclusive rule in cases in which the reasons underlying it do not make it applicable that it fails to meet the demands of substantial justice. . . .

In most of the decisions the question as to the exact time when the notice should have been given has not received much attention; there being no difficulty arising from the fact that it was given after the contract was made, but before the damage resulted. But in some cases it has been attempted to establish the right to damages beyond those which would ordinarily arise from the breach of the contract in the particular case, by showing notice of the special circumstances after the making of the contract and before the breach, and, although there was an intimation by one of the judges in Gee v. L. & V. Ry. Co., 6 H. & N. 217, that such notice ought to be held to be effectual for the purpose, the decisions have been to the contrary in cases of this character which have come to our attention, where it became necessary to pass upon the point. Jordon v. Patterson, 67 Conn. 473, 35 Atl. 521; Ligon v. Mo. Pac. Ry. Co., 3 Willson, Civ. Cas. Ct. App. §1; 1 Sedgwick on Damages, §158. The principle of these decisions is that the party undertaking the delivery is held to assume, when he makes his contact, a liability only for those damages which would, in the usual and ordinary course of things, result from his failure to perform, because it is only these that he is required to foresee, unless it is shown that knowledge of an unusual situation of the other party, in which extraordinary injury may be caused by nondelivery, has been brought to his attention,

and that he has contracted with reference thereto. In other words, it is held that the rights and liabilities of the parties are fixed by the contract and the circumstances known to them when it is made, and cannot be increased by notice of other facts subsequently given. The reasons which have been given for this are well condensed by Judge Denman in the Belcher Case, 89 Tex. 428, 35 S.W. 6. The notice relied on in such cases subsequent to the contract appears to have been given at a time when its effect, if held sufficient, would have been to impose an additional liability, resulting from the contract itself, to that within the contemplation of the parties when they made it. In none of them were the facts like those in the present case, in which the contract to carry to Washita had been fully performed, and the property was at the point of destination, an could have been delivered, when the notice was given. All that remained to be done was to make delivery, and this it was then in the power of the carrier to do at once. It had no right to demand extra compensation for a transportation already performed, for making delivery; nor had it the right to refuse or delay delivery because of the conditions of which it then received notice. No extra or unusual preparations were necessary for delivery, or, if they were, the defendant was, at the time, in as good a position to make them as it would have been, had the notice been given when the contract was made. The simple fact is that it held so much of plaintiff's property of which he desired, and was entitled to immediate possession, for a special purpose and for the lack of which, de-

fendant was then fully informed plaintiff was in danger of suffering the loss for which compensation is now sought, which loss could have been prevented by mere delivery of the property. In such a case, knowledge of these facts, when the contract for transportation was made, appears to us to be unessential. None of the reasons exist for which such notice has been required in other cases. The plaintiff's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to delivery the property, due to the faithlessness of defendant's agent, at a time when the probable consequences thereof were fully disclosed."

The reasoning of the Texas court in that case for awarding the consequential damages to the plaintiff exactly supports Amtro's recovery in this case. All that remained to be done by Schnitzer at the time that Schnitzer received notice that failure to do it would damage Amtro was to make payment. Schnitzer did not have the right to refuse payment. Amtro's damages, in the words of the *Bourland* decision, "did not arise from . . . any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to [pay the demurrage and balance of the freight] at a time when the probable consequences thereof were fully disclosed."

There is no valid reason why the fact that the duty involved in the present case was the duty to pay money rather than the duty to deliver property, as in the *Bourland* case, should make any difference in the prin-

ciple to be applied. This is not a situation coming within the old maxim that for mere delay in paying a money demand, interest on the money is the only damages to be recovered. This court has recognized that this rule is not applicable "where the obligation to pay is special and has reference to objects other than the mere discharge of a debt."

Hasquet v. Big West Oil Co., 29 F. 2d 78, 79 (9th Cir. 1928).

Schnitzer's demurrage obligation was in this excepted category. Schnitzer's fundamental obligation under the voyage charter was that the vessel should be discharged, and hence available for other employment by Amtro, within the lay time. The demurrage was merely a stipulated payment to be made by Schnitzer to Amtro for breach of this primary obligation. It was primarily of advantage to Schnitzer, since, under evidence as to which there is no conflict (see p. 46 of this brief), the stipulated demurrage rate was substantially less than the expenses which would actually be suffered by Amtro during any period of delay. A contract such as this charter was cannot be treated as simple obligation to pay money. It would be entirely unreasonable to hold that the damages payable by Schnitzer for the breach not only of its secondary demurrage obligation, but also of its primary obligation to discharge the vessel in time, are the amount of the secondary obligation, plus interest, where Schnitzer refused to pay the secondary obligation at a time when Schnitzer knew that payment was required to avoid consequential damages to Amtro.

Because of the particular dual nature of Schnitzer's obligation under the voyage charter, it is not necessary that this Court in this case re-examine the basic prem-

ises behind the rule making the amount of the debt plus interest the exclusive measure of damages for failure to pay a simple debt. We submit, however, that this rule is over-ripe for re-examination in the light of modern conditions and developing concepts of business morality. The rule, though an ancient one, has never been justified on any grounds higher than convenience. *Williston on Contracts,* Vol. 5, page 3925, states the justification as follows:

> "The universality of the rule limiting damages to interest in thus based on a policy of having a measure of damages of easy and certain application, even if it occasionally leads to results at variance with the general principle of compensation."

Under modern conditions any universal and automatic application of the rule leads to evils which far outweigh any convenience of the rule. If the rule is universally applied, it provides an incentive for any business man who is able to earn more than the legal interest rate by using his money in his business (and this includes almost all business men under present conditions) to refuse to pay his debts, whether he has any meritorious defense or not, simply for the sake of the continued use of the money while the claim is being tried through the courts. This furnishes a strong temptation to the unscrupulous to engage in tactics which the business community recognizes, and should recognize, as unethical. From the point of view of the administration of the courts, it would seem that the burden of the unmeritorious litigation which the rule tends to produce far outweighs any convenience in the determination of damages which is provided by the rule. Certainly justice requires the allowance of damages in addition to the

interest in any case where defendant was placed on notice at the time payment was due that his failure to pay would cause such damages, and chose to refuse to pay nevertheless.

For all of the foregoing reasons, the District Court should have awarded to Amtro against Schnitzer, in addition to the demurrage and the balance of the freight and interest thereon,[7] consequental damages for Schnitzer's breach of the voyage charter contract in the amount of Amtro's liability to Owners for the time charter breach.

B. The District Court Should Have Awarded Amtro These Amounts as Damages for Schnitzer's Tort of Intentional and Unprivileged Prevention of Amtro's Performance of the Time Charter.

Even if, despite the foregoing, these damages must be held not to be recoverable by Amtro as consequential damages for breach of contract, they should have been awarded to Amtro as tort damages against Schnitzer. Under the facts shown by the uncontradicted evidence and the findings of the District Court, Schnitzer's act in refusing to pay the demurrage to Amtro after notice of, and in wilful disregard of, the consequences to Amtro was a tort.

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[7]There is no element of double recovery here, since if Schnitzer had paid the demurrage and the balance of freight, Amtro would have had the use of the money and would also have avoided liability to Owners for damages for breach of the time charter. Amtro would have used part of the money from Schnitzer to pay the amounts then due to Owners under the time charter (in distinction to the damages for its breach), but the District Court has in its present judgment allowed interest on those amounts to Owners against Amtro at the same rate as the interest allowed Amtro against Schnitzer on the demurrage and the balance of the freight.

The law is clear that if a breach of contract is also a tortious breach of a duty owed by the defendant to the plaintiff, tort damages may be allowed. An act that constitutes a breach of contract may also be tortious.

Acadia, California, Ltd. v. Herbert, 54 Cal. 2d 328, 5 Cal. Rptr. 686, 353 P. 2d 294 (1960);

Jones v. Kelly, 28 Cal. 251, 255-56, 280 Pac. 942, 943 (1929);

Harper v. Interstate Brewery Co., 168 Or. 36, 120 P. 2d 757, 762-763 (1942);

Peitzman v. City of Illmo, 141 F. 2d 956 (8th Cir. 1944), cert. den. 323 U.S. 718, 89 L. Ed. 577, 65 S. Ct. 47, reh. den. 323 U.S. 813, 89 L. Ed. 647, 65 S. Ct. 112;

Sanderson v. Crowley, 180 F. 2d 124 (5th Cir. 1950).

The duty to Amtro which Schnitzer breached was the overriding duty which every man owes to another not to intentionally injure him. That the duty grew out of a contract does not make its breach any less a tort. As the California Supreme Court stated in *Jones v. Kelly, supra*:

> "If the cause of action arises from a breach of promise, the action is ex contractu, but, if it arises from a breach of duty growing out of the contract, it is ex delicto. Mobile Life Ins. Co. v. Randall, 74 Ala. 170. A tort and trespass is none the less such because it incidentally involves a breach of the contract. Stock v. Boston, 149 Mass. 410, 21 N.E. 871, 14 Am. St. Rep. 430. The law imposes the obligation that 'every person is bound, without contract, to abstain from injuring the per-

son or property of another, or infringing upon any of his rights.' Section 1708, Civ. Code. This duty is independent of the contract and attaches over and above the terms of the contract."

Or as the Oregon Supreme Court stated in *Harper v. Interstate Brewery Co., supra*:

"Thus it may be necessary for a plaintiff to show a contract berween himself and the defendant in order to establish that the defendant has assumed a position, relationship or status upon which the general law predicates a duty independent of the terms of the contract but it does not necessarily follow that his only remedy is ex contractu. If from the position, contractually assumed, a duty be raised independent of the contract an action in tort may lie."

Such an additional element of duty may be raised by notice of special circumstances brought home to the obligor under a contract at the time performance is due, the duty being to act reasonably in the light of those circumstances.

Gardner v. Mid-Continent Grain Co., 168 F. 2d 819 (8th Cir. 1948).

See also:

Conn v. Texas & N.O. Ry. Co., 14 S.W. 2d 1004 (Comm. of Appeal of Texas 1929);

Western Union Telegraph Co. v. Hice, 288 S.W. 175 (Comm. of Appeal of Texas 1926);

Virginia-Carolina Peanut Co. v. Atlantic Coastline Railroad, 155 N.C. 148, 71 S.E. 71 (1911).

The tort committed by Schnitzer against Amtro was the tort of intentional and unjustified interference with Amtro's contract with owners. This tort is recognized under federal law, see

Arkansas v. Texas, 346 U.S. 368, 74 S. Ct. 109, 98 L. Ed. 80 (1953).

and is recognized as a maritime tort for the purposes of admiralty jurisdiction when the contract interfered with is a maritime contract.

Sidney Blumenthal & Co. v. United States, 30 F. 2d 247 (2d. Cir. 1929) cert. den. 279 U.S. 847, 73 L.Ed. 991, 49 S. Ct. 345;

The Poznan, 276 Fed. 418, 433 (S.D.N.Y. 1921, L. Hand, D.J.).

The tort may be committed by acts which disable one of the parties from performing his contract just as much as by the act of inducing a breach.

Angle v. Chicago, St. Paul etc. Railway, 151 U.S. 1, 13-15 (1893), 38 L. Ed. 55, 14 S. Ct. 240 (in which disablement was stated to be an *a fortiori* instance of the tort);

Sidney Blumenthal & Co. v. United States, cited *supra;*

The Poznan, cited *supra;*

Bacon v. St. Paul Union Stockyards, 161 Minn. 522, 201 N.W. 326 (1924).

Acts disabling a party to a contract from meeting his financial obligations under the contract are a basis for the tort just as much as acts disabling the party from performing in any other way.

Keene Lumber Co. v. Leventhal, 165 F. 2d 815 (1st Cir. 1948) (acts by defendants in diverting from a corporation the assets needed to meet its debts held to be a tort as to a creditor of the corporation whose claim the corporation was thereby rendered unable to pay).

See also:

Angle v. Chicago, St. Paul etc. Railway, cited *supra* (in which plaintiff had contracted with a railway company to build a stretch of railway, and defendants wrongfully procured the revocation of a land grant to the railway company. Plaintiff was held entitled to recover damages in tort on the basis of defendant's unprivileged interference with the contract between plaintiff and the railway company, a portion of which damages arose from the fact that the railway company was thereby deprived of the means to pay plaintiff under the contract).

Many of the cases involving this tort have arisen as suits by one of the parties to a contract against a third party who interfered with the performance of the other party to the contract. However, the tort recovery is not limited to these situations. If the party whose own performance is interfered with is the party damaged, that party is equally entitled to damages in tort for the injury suffered.

Wilkinson v. Powe, 300 Mich. 275, 1 N.W. 2d 539 (1942);

Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W. 2d 501 (1938);

Prosser, Torts, 3rd Ed. p. 960.

"We may generalize that any intended and unprivileged interference which causes loss to either party to a transaction is actionable by the party suffering the loss."

Harper and James, Law of Torts (1956), Vol. 1, p. 499.

In the present case, that it was Amtro rather than owners which were damaged by Schnitzer's acts disabling Amtro from performing its contract with owners does not alter the principles involved. This is nicely illustrated by two cases arising out of the same set of facts,

Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405 (1908).

and,

Sumwalt Ice Co. v. Knickerbocker Ice Co., 114 Md. 403, 80 Atl. 48 (1911).

the first of which is one of the landmark cases in this area of tort law. In those cases, Knickerbocker Ice Co., which was an ice manufacturer, contracted with Sumwalt Ice Co., which was a dealer, to supply all of Sumwalt's ice requirements for a specified period. Sumwalt Ice Co. contracted with Gardiner Dairy Co. to supply ice to Gardiner Dairy Co. Knickerbocker informed Sumwalt that it would stop selling to Sumwalt, despite its contract with Sumwalt, if Sumwalt did not breach its contract with Gardiner and stop selling to Gardiner. Sumwalt, under pressure of this threat, did stop selling to Gardiner, and Gardiner was thereby forced to buy ice direct from Knickerbocker at a higher price. In *Knickerbocker Ice Co. v. Gardiner Dairy Co.,* Knickerbocker was held liable to Gardiner for the damages caused to Gardiner by Knickerbocker's tortious in-

terference with the contract between Gardiner and Sumwalt. In *Sumwalt Ice Co. v. Knickerbocker Ice Co.,* a separate suit, Sumwalt was held entitled to recover from Knickerbocker the damages suffered by Sumwalt from the loss of its contract with Gardiner because of the same tortious interference.

These cases also illustrate that the tort of unjustified interference with contractual relations is no exception to the general rule that conduct which is a breach of contract may also be a tort. The act of Knickerbocker which was held to be a tort as to both Sumwalt and Gardiner was a threat by Knickerbocker to breach its contract with Sumwalt. Indeed, one of the grounds upon which the court in *Knickerbocker Ice Co. v. Gardiner Dairy Co.* held that Knickerbocker's threat to Sumwalt was tortious was that the threat was not within Knickerbocker's rights under the terms of the Knickerbocker-Sumwalt contract.

A negligent, as distinct from an intentional, interference with a contract is generally held not actionable. On the other hand, malice in the sense of a desire to harm the plaintiff is not a necessary element of the tort. In many of the cases, the object of defendant's interference with the contract was to appropriate the benefits of the plaintiff's business to himself, and where this is the objective, it is generally held that the interference is actionable even though the defendant would have had the right to do what he did had he not done it for this purpose.

See, *e.g.,*

Knickerbocker Ice Co. v. Gardiner Dairy Co., cited *supra,* at page 409 of 69 Atl.;

Wilkinson v. Powe, cited *supra.*

It has also been held, however, that the party interfering with the performance of the contract may be liable in tort for the resulting damages where he has interfered in pursuit of his own ends, unrelated to the prevention of performance, but with the knowledge that his conduct is certain or substantially certain to prevent performance of the contract. The question determinative of liability in that situation is the question of whether the defendant was privileged to do what he did, that is to say whether the objective pursued by the defendant and the means used are ones to which the law should give protection superior to the protection afforded to the interest of the plaintiff in the contract which was interfered with. Though there is some conflict in the decisions involving that situation, this is the view favored by the leading text writers on torts.

See:

Prosser, Torts, 3rd Ed. pp. 966-67;

Harper and James, Law of Torts, 1956 Ed., Vol. 1, pp. 497-8.

This is also the clear holding of the two admiralty cases which we have found involving this tort. In

Sidney Blumenthal & Co. v. United States, cited *supra,*

the U. S. Fleet Corporation issued a bill of lading to the libelant for the carriage of goods belonging to the libelant from Shanghai to Seattle with trans-shipment to New York. The bill required the goods to be transshipped at Seattle on a ship of one of two specified lines. The managing agents for the vessel on which the goods were carried from Shanghai to Seattle, with knowledge of the terms of the bill of lading, trans-

shipped the goods at Seattle upon a steamer of another line, which became a total loss. The libelant cargo owner was held entitled to recover from the U. S. Fleet Corporation for the loss of the goods on the ground of conversion consisting of a violation of the trans-shipment terms of the bill of lading. The U. S. Fleet Corporation had impleaded the managing agents asserting liability-over. The U. S. Fleet Corporation was held entitled to recover from the managing agents the amount for which the U. S. Fleet Corporation became liable to the libelant for breach of the bill of lading contract. (It should be noted that this is precisely the same arrangement of the parties and precisely the same type of relief which is being sought by Amtro against Schnitzer in this case.) The Court of Appeals for the Second Circuit held the managing agent liable on the ground that it had committed the tort of unprivileged interference with the performance by the U. S. Fleet Corporation of its bill of lading contract with libelant. This was not a case in which the managing agent brought about the breach of the contract with the object of profiting from the breach. The basis of the managing agent's tort liability was only that it had trans-shipped with knowledge that this would cause a breach of the bill of lading contract, and without any interest in doing so which could form the basis for any privilege to do so. The reasoning of the court on this issue, as stated in the opinion by Judge Learned Hand, was as follows:

> ". . . but the question of 'malice' is more difficult. In the earlier cases the courts generally added that 'malice' or some unlawful means was an essential element to the liability. [citing cases] The notion may be found in more recent cases [citing cases], though it is usual, when any motive is re-

quired, to define it as a purpose to profit at the promisee's expense [citing cases]. But there is a substantial body of authority saying that the liability depends upon the actor's intention to cause the breach, which puts upon him the duty to show some excuse or justification. [citing cases] Perhaps it would be untrue to say that the doctrine has as yet come to rest, but it seems probable that, when the wrong is in procuring the breach of an existing contract, as distinct from interfering with the plaintiff's business or trade, motive will in the end disappear as a constitutent element, though it may indirectly be material.

The first step was to recognize that a promisee had any rights, except as against the promisor. That bridge crossed, and the person who induced or made inevitable the breach being recognized as a tort-feasor, there seems to be no reason for treating the tort as different from any other. Conduct which produces a loss may of course be privileged; that is to say, the actor may be asserting or protecting some interest which the law admits as an excuse, and his motive is at times relevant. Perhaps this is merely because it is thought reprehensible, though the more satisfactory reason is that his purpose may disclose that he is not genuinely engaged in asserting the protected interest, in which case no conflict really arises between it and the interest of the injured party. But, if he have no interest to assert, he can have no privilege and his motive can hardly be material."

The other admiralty case which we have found, decided by Judge Learned Hand as District Judge, is

The Poznan, cited *supra.*

That case involved a vessel under charter. The charterer, not as agent for the owner or master but in its own name, issued bills of lading for the carriage of cargo from New York to Havana. Since the congestion in the Port of Havana was extreme, the owners of the vessel, instead of permitting it to wait and discharge the cargo, ordered it back to New York. They thereby made it impossible for the charterer to perform its bill of lading contract with the shipper. The owner was held liable to the shipper in tort for damages for the non-delivery on the ground that the action of the owner was an unprivileged interference with the performance of the bill of lading contract. The owner was not in any position to profit from the breach of the bill of lading contract as such. The owner's interest was in avoiding its own expense in having a vessel idle at Havana, under a charter to a charterer in financial difficulties.

The same principle was applied by the Court of Appeals for the First Circuit (under Massachusetts law in this instance) in

Keene Lumber Co. v. Leventhal, cited *supra.*

In that case, the interest being served by the parties who diverted the assets from the corporation was their own profit in doing so, not any interest in the breach of the corporation's obligation to plaintiff which was caused thereby. The acts of the defendants were held to be a tort as to the plaintiff creditor of the corporation on the ground that these acts were committed with inowledge that they would cause breach of the corporation's obligation to plaintiff, and were not privileged because the means used were wrongful.

Under these principles, Schnitzer, having refused to pay Amtro at a time when it knew that its refusal to

pay would disable Amtro from living up to its time charter with owners, is liable in tort to Amtro for the damages caused thereby unless Schnitzer can rely upon some privilege which the law should recognize as superior to Amtro's interest. We have found no precedent on the question of privilege in this setting. The interest being served by Schnitzer was, as far as appears from the record, its interest in delaying payment of a clear and unambiguous obligation, perhaps because it could use its money more profitably somewhere else in the interim. In all justice, it is hard to see how this can be a basis for any privilege in the face of the severe and known damage to Amtro. Perhaps even in the face of the known damage to the other party, a party to a contract should be privileged to refuse payment in order to assert what it believes in good faith to be a defense to payment. Even here, however, it could be argued with great force that if a party should choose to rely on such a defense in the face of known damage to the other party, the party so relying should be required to do so at his peril to the extent that, if the court subsequently holds the defense to be groundless, the party should be required to pay the compensatory damages.

This Court does not have to resolve that difficult question in this case. The facts found by the District Court clearly establish that when Schnitzer received notice that failure to pay would disable Amtro from performing its time charter with owners, and refused to pay in the face of that notice, it did not do so for the purpose of asserting any good faith defense to liability. The defense to liability finally asserted by Schnitzer in the District Court, (and upon its appeal to this Court),

is based entirely on the assertion that the voyage charter required Schnitzer to pay the demurrage and the balance of the freight only if Amtro was unable to obtain payment by exercising a lien on the cargo, and that Amtro was in fact able to obtain payment by this means. The foundation for this defense by Schnitzer is an interpretation of the charter *directly opposite* to the interpretation which Schnitzer adopted and urged upon Amtro at all times while the charter was in effect, and until after the completion of the discharge, including the time at which Schnitzer received notice from Amtro that payment was needed in order to prevent breach of the time charter. The District Court found this to be the fact. Its finding was as follows [R. Vol. I, pp. 140-141]:

> "Aside from the views here expressed on the interpretation of the charter, I find a record which places Schnitzer in the indefensible position of first agreeing to pay demurrage, and later attempting to change its position. On November 13, 1961, when Schnitzer was first contacted by Amtro's counsel, after the vessel had been on demurrage for about one month, Schnitzer agreed to pay the demurrage, but objected to payment of that item and the balance of the freight until the completion of the discharge, on the ground that such items were not due under the charter until that time. This testimony of a Mr. Fletcher is uncontradicted. Subsequently, Schnitzer's counsel took the position that in fact there was no lien on the cargo for the demurrage. Schnitzer relied on this construction of the contract from about November 17th until after the cargo had been discharged on December 31st."

Under these facts found by the District Court, Schnitzer has no possible privilege, and Schnitzer's refusl to pay the freight and demurrage after notice was an unjustified prevention by Schnitzer of Amtro's performance of its time charter contract with owners, and therefore a tort by Schnitzer. Amtro is entitled to recover from Schnitzer for that tort the damages caused thereby to Amtro, consisting, in addition to the demurrage and balance of freight and interest thereon, of the damages payable by Amtro to owners for breach of the time charter, including of course the interest which has been allowed owners against Amtro on those damages.

On all of the grounds stated, the judgment of the District Court must be reversed insofar as it denies these damages to Amtro, with directions to enter judgment for these damages.

II.

The District Court Erred in Failing to Award to Amtro Against Schnitzer the Sum of $33,975.00 Under the "Extra Expense" Clause of the Voyage Charter.

The voyage charter between Amtro and Schnitzer [Lib. Ex. 2], in addition to the provisions requiring the vessel to be loaded and discharged within the lay time and the demurrage provision, contained the following provision in clause 1 as part of the typewritten language specifying the types of cargo to be carried for Schnitzer:

> "Any extra expenses incurred by reason of nature of cargo and of metallurgical expert to be for charterers' account."

Evidence was introduced at the trial as to which there is no conflict whatever that the delay to the Nictric in obtaining a berth in Japan and discharging was due to the fact that she carried scrap cargo of the particular nature which Schnitzer loaded aboard her, and not other cargo, and that during the period of delay thus caused Amtro's expenses exceeded the demurrage rate by the sum of $450.00 per day, for a total of $33,975.00. Amtro sought to recover this amount from Schnitzer as "extra expense" under the above clause. The District Court denied Amtro recovery on the basis of the following interpretation of the charter clause [R. Vol. II, pp. 145-146]:

> "Furthermore, it would require the imagination of a leprechaun to extend this language to cover a situation where a ship carrying scrap was compelled to wait longer to obtain a berth than ships carrying other kinds of cargo. Obviously, the 'extra expenses' mentioned in this clause refer to those expenses, if any, directly incurred in loading, transporting or discharging the scrap."

Without claiming any relationship to Irish elves, we submit that this interpretation of the clause restricts its application in a way not warranted by its language. The clause does not say "directly" incurred, and makes no reference to the loading transporting or discharging of the scrap, or to any other category of expenses. The clause states, without qualification, "any extra expenses incurred by reason of nature of cargo."

If this Court believes that the clause is ambiguous in this respect, such ambiguity must be resolved against

Schnitzer in view of the following Finding of Fact of the District Court [R. Vol. I, p. 140]:

> "The form of the contract, the language used, the deletions made and the endorsement attached, are all chargeable to Schnitzer and, I so find under the undisputed evidence before me."

It is true that the demurrage provision in this charter specified an amount to be paid by Schnitzer for each day by which Schnitzer failed in its obligation to load and discharge the vessel within the lay days. However, this was for delay generally and without regard to cause. It did not purport to rule out or supersede other clauses in the charter providing for payment of additional expenses from particular causes, even though these causes might involve delay as one of their elements. This is particularly clear in this charter where the demurrage rate was fixed at a figure far less than Amtro's expenses of operating the vessel during any period of delay, and therefore was not designed, as the District Court characterized it, "to make an adequate allowance or compensation for the delay or detention of the vessel" [R. Vol. I, p. 146].

The District Court made the following Finding of Fact on this issue [R. Vol. I, p. 145]:

> "While the record discloses that a scrap cargo, such as was carried by the NICTRIC was not favored in the discharging scheme in Japan, it does not support a finding that the total delay, or any specific part thereof, was due to the nature of the cargo."

The second part of this finding is clearly erroneous under evidence as to which there is no conflict in the

record. Pacific Marine Corporation, Schnitzer's Tokyo agent under this charter [Pretrial Order, Admitted Facts XII, R. Vol. I, p. 106] prepared a report on the congestion dated September 15, 1961, which was admitted into evidence as Exhibit F-23 to the depositions taken in Japan. This report was properly admitted into evidence by the District Court as a business record [R. Vol. I, p. 186]. The date of the report was while the Nictric was at the port of Tokyo waiting for a berth.

The report states, as to the congestion:

"II. Present Position:

(A) Degree of Congestion

The degree of congestion depends in large measure on the type of cargo being carried and we would list the types of operation in order of increasing congestion as follows:

(1) Regular liner vessels loading general cargo at all ports—very little congestion except at individual ports on occasional month-end dates.

(2) Regular liner vessels discharging general cargo with no more than 3,400 tons of non-ferrous scrap—comparatively little congestion, possibly 2 or 3 days delay altogether in Japan.

(3) Semi-liner vessels including larger quantities of non-ferrous or ferrous scrap—one or two weeks slowdown at each port.

(4) Tramp vessels discharging ore, coal, grain or other commodities going into consignees' own installation or into 'clean cargo' lighters—one week or so delay.

(5) Tramp vessels dischaging [sic] lumber, logs (into the water) or scrap into 'dirty cargo' lighters—great congestion ranging from one week to three months' wait for berth and three weeks to one-and-a-half months for discharge.

(B) Commodities

The worst commodities are scrap, then lumber, logs."

The testimony of Mr. Saishoji, the head of Tokyo Operations of the tramp ship agency division of owners' agents in Japan [Ex. 44E, p. 36, lines 1-23], the testimony of Leonard Schnitzer [R. Vol. II, p. 190] and the testimony on deposition of Mr. Koizumi, a manager of Pacific Marine Corporation called as a witness by Schnitzer at the depositions in Japan [Ex. 44H, pp. 187-26 to 187-27] was to the same effect and corroborate the report.

Moreover, the District Court made a finding of fact in another connection from which it follows that the particular nature of the Nictric scrap caused the delay. Schnitzer contended at the trial that Amtro could have liened the cargo by discharging it at a special wharf it contended was available. The District Court found [R. Vol. I, p. 143]:

"The record does not support this contention. Schnitzer's agent tried to put the vessel in at this particular wharf, but could not do so *on account of the nature of the vessel's scrap. The scrap could not be discharged in seven days, and, therefore, was not eligible for space at the particular wharf* (emphasis supplied)."

The Nictric was actually delayed 82½ days in excess of the lay time provided under the charter (the lay days expired October 9 at 12:18, Pretrial Order, Admitted Facts X [R. Vol. I, p. 105] and discharge was completed December 31, 1961, at 0001 hours, Admitted Facts VIII [R. Vol. I, p. 105]. Subtracting from this period the delay of one week suffered by the next-most delay ridden category of cargo reported by Pacific Marine namely "ore, coal, grain and other commodities going into consignees' own installations or into clean cargo lighters," the delay caused by the nature of the cargo amounted to 75½ days.

The evidence as to which there is no conflict whatever is that the expenses of Amtro of operating the Nictric during the period of the delay were $1,150.00 a day [Testimony of Mr. Stewart, R. Vol. II, pp. 50-51]. The demurrage rate was $700 a day.

Therefore, under evidence as to which there was no conflict, the extra expense to Amtro by reason of the nature of the cargo was $450.00 a day times 75½ days. or a total sum of $33,975.00. The District Court erred in failing to award this sum to Amtro, and the judgment, of the District Court must be reversed on this point with directions to enter judgment in favor of Amtro against Schnitzer in that sum.

III.

The District Court Erred in Construing Clause 23 of the Time Charter Between Amtro and Owners Relating to Crew Overtime.

The single point on which Amtro is appealing from the judgment of the District Court in favor of owners against Amtro is the inclusion by the District Court in that judgment of the sum of $1,658.41, as contended by Owners rather than the sum of $478.47, as contended by Amtro as the amount payable by Amtro to owners under clause 23 of the time charter [Lib. Ex. 1]. The issue is one of construction of the clause. The clause is a clause in the printed form of the time charter which was modified in this particular charter by crossing out certain words and substituting others. The clause is as follows, with the words which were crossed out appearing in parentheses, and the words which were added being italicized:

> "23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, if required, Charterers agreeing to pay (officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles) *$350.00 per month or pro rata in lieu of all overtime.*"

The issue is whether the $350.00 per month or pro rata is payable by charterer only during loading and discharging operations, in which case the amount payable

was stipulated to be $478.47, or during the entire period of the charter regardless of what the vessel was doing, in which case it was stipulated that the amount payable was $1,658.41. The District Court adopted the latter construction of the clause on the following reasoning [R. Vol. I, pp. 133-134]:

> "The record discloses that the substitution was made in order to eliminate the need for mathematical calculations and record keeping. If, as argued by Amtro, the language be interpreted to mean that the overtime should apply only during periods of loading and discharge, there would have been no need for the elimination of the quoted language, nor for the substitution of the underlined language. True enough, the substituted language is subject to a charge of ambiguity. Nevertheless, when read in the light of the Captain's testimony and of the deleted language, the intention of the parties assumes a cloak of understanding and dictates a finding that the parties intended a flat $350.00 per month, or pro-rata for a partial month, regardless of the actual amount of overtime consumed. Otherwise, the substituted language is completely without meaning."

The conclusion does not follow from the court's premises, and is wrong. Under either interpretation of the clause, the necessity for record keeping with respect to the overtime actually worked and the amounts payable for such overtime which would be necessary under the printed language are eliminated. It makes little difference to the record keeping or the calculation involved whether the payment at the monthly rate is based on

the total time elapsed under the charter or the time when the vessel is loading or discharging.

Under the original printed language, it is clear that the only overtime payable by the charterer is overtime caused to owners by their making the crew available under clause 23 for night work during loading and discharging. Crew overtime during any other period is borne by the owners. Therefore, when the words requiring charterer to pay overtime worked are crossed out and the words "$350.00 per month or pro rata in lieu of all overtime" are substituted, the overtime that the stipulated monthly payment is "in lieu of" must be only the overtime during periods when the owners may be required to comply with the clause, and not other overtime for which owners would have to pay anyway. Therefore, a $350.00 per month payment must be applicable only during periods of loading and discharging. If the $350.00 per month were intended to be payable continuously during the period of the charter there would be no reason to provide for it separately. The monthly charter hire would simply have been increased by that amount.

On the foregoing grounds judgment of the District Court in favor of Amtro against owners must be reversed on this point with direction to reduce the amount of the judgment by the sum of $1,179.94.

Conclusion.

We submit that the decree of the District Court, though it should be affirmed except as to the points raised on this cross-appeal, must be reversed on those points, with directions to modify the decree as follows:

1. To add to the amount of the present decree in favor of Amtro against Schnitzer the sum of $24,745.27 plus interest at 6% per annum from February 6, 1962 (that being the interest allowed owners against Amtro on the damages for breach of time charter);

2. To add to the present decree in favor of Amtro against Schnitzer the further sum of $33,975.00.

3. To reduce Owners' decree against Amtro for the amounts due under the time charter in the sum of $1,179.94.

Respectfully submitted,

ALEX L. PARKS,
DUSENBERY, MARTIN, BEATTY,
PARKS & TEMPLETON,
ROBERT A. FLETCHER,
FLETCHER & RAUCH,
Proctors for Cross-Appellant Amtro Corporation, S.A.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FLETCHER